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Ernest E. Means

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Spurious Legislation and Spurious Mandamus in Florida

ERNEST E. MEANS*

The Florida Supreme Court has, in a number of recent cases, issued peremptory writs of mandamus directing the secretary of state to expunge designated wording from the official legislative record, of which he is the constitutional custodian. The author argues that these holdings constitute a clear abuse of this extraordinary writ, most recently as a mere pretext for bringing a constitutional challenge to the validity of a statute within the original jurisdiction of the supreme court. The author also proposes a conceptual framework for dealing with a material variation in wording between a bill as enacted by the legislature and the same bill as it is signed into law by the governor.

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* Research Associate, Retired, Florida State University College of Law. B.A., Wittenberg University; M.S. University of Wisconsin; Ph.D., University of Wisconsin; LL.B., University of Florida.

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I. INTRODUCTION

In the case of *State ex rel. Smith v. Firestone*,¹ the Circuit Court for the Second Judicial Circuit issued the following order:

This cause now being before me pursuant to this Court's alternative writ of mandamus

It is ordered and adjudged that the Respondent, George Firestone, Secretary of State, strike the following language from the laws of Florida as it appears [in] the enrolled CS for SB 348:

Each application for approval of the establishment and maintenance of a branch office shall state the proposed location thereof, the need therefor, the functions to be performed therein, the estimated volume of business thereof, the estimated annual expense thereof, and the mode of payment therefor. Each such application shall be accompanied by a budget of the association for the current earnings period and for the next succeeding semi-annual period, which reflects the estimated additional expense of the maintenance of such a branch office.²

On its face, this order raises disturbing questions. For one, it would seem that the implication of such an order in mandamus is that the secretary of state actually possesses authority, in appropriate circumstances, to expunge language from an enrolled act of the legislature that is in his custody. For another, if the secretary of state does not have such authority, and surely he does not, was it not an abuse of the writ of mandamus for the court to issue such an order? And was it not also an abuse of this so-called extraordinary writ for the court to order performance of an act that could not possibly benefit the relator attorney general, or anyone else, in any meaningful way? Finally, and incidentally, what must be the constitutional status of an act of the legislature, whatever its sub-

1. No. 80-2354 (2d Cir. Ct. Sept. 5, 1980).

2. *Id.*, slip op. at 1.

ject matter, that could be the object of such an order? These questions will be explored following this chronology of the relevant events leading to the peremptory writ quoted above.

April 8, 1980: As a consequence of regular "sunset" review,³ chapter 665 of the Florida Statutes,⁴ which regulates savings and loan associations, would have expired automatically on July 1, 1980.⁵ On April 8, 1980, Senate bill 348, revising chapter 665, was introduced.⁶ On the same date a committee substitute for Senate bill 348⁷ was moved to final passage and certified to the House.⁸

May 28, 1980: The House passed Committee Substitute for Senate bill 348 with two amendments.⁹ Amendment 1 amended "all after the enacting clause," thereby effectively substituting an entirely different bill.¹⁰ Amendment 2 substituted a new title.¹¹

June 6, 1980: The Senate adopted seven amendments to House amendment 1, and one amendment to House amendment 2.¹²

June 6, 1980: The House concurred in Senate amendments 5 through 7 to House amendment 1, and in Senate amendment 1 to House amendment 2. The House refused, however, to concur in Senate amendments 1 through 4 to House amendment 1, and requested the Senate to recede therefrom.¹³

June 6, 1980: The Senate obliged, ordering the bill to be certified back to the House without Senate amendments 1 through 4 to House amendment 1,¹⁴ and to be engrossed¹⁵ and enrolled.¹⁶

3. The Regulatory Reform Act of 1976, FLA. STAT. § 11.61 (1979), now known as the Regulatory Sunset Act, FLA. STAT. § 11.61 (1981), provides for the systematic review of specified governmental licensing and regulatory functions and mandates specific dates of automatic repeal.

4. Florida Savings Association Act, FLA. STAT. ch. 665 (1979).

5. 1977 Fla. Laws ch. 77-457, § 1 (amending 1976 Fla. Laws 76-168, secs. 3-4).

6. FLA. S. JOUR., 1980 Reg. Sess. at 39.

7. *Id.* at 65.

8. *Id.* at 65-66.

9. FLA. H.R. JOUR., 1980 Reg. Sess. at 712-42.

10. *Id.* at 713-41.

11. *Id.* at 741-42.

12. FLA. S. JOUR., 1980 Reg. Sess. at 959.

13. FLA. H.R. JOUR., 1980 Reg. Sess. at 1296-98.

14. FLA. S. JOUR., 1980 Reg. Sess. at 1010.

15. Engrossment is a procedure by which a revised copy of a bill is prepared, clearly showing approved amendments. A. COIGNE, *STATUTE MAKING, A TREATISE ON THE MEANS AND METHODS FOR THE ENACTMENT OF STATUTE LAW IN THE UNITED STATES* ¶ 195 (1948); H. WALKER, *LAW MAKING IN THE UNITED STATES* 361-63 (1934).

16. An enrolled bill is one which appears in final engrossed form on the sheet which is

June 30, 1980: The Governor approved the enrolled copy of Committee Substitute for Senate bill 348, and it thereby became a law.¹⁷

August 8, 1980: Sometime prior to August 8, 1980, but subsequent to the Governor's approval of Committee Substitute for Senate bill 348, the Senate leadership discovered that Senate amendments 1 through 4 to House amendment 1, from which the Senate had receded at the request of the House, had been erroneously engrossed into the bill prior to its enrollment and presentation to the Governor. Thus, the bill signed by the Governor did not contain language that the erroneously engrossed Senate amendments 1 through 4 had deleted,¹⁸ and contained language that the erroneously engrossed Senate amendment 4 had added.¹⁹

August 8, 1980: The President of the Senate informed the Secretary of State of the erroneous engrossment of Senate amendment 4 into Committee Substitute for Senate bill 348 and requested that the Secretary of State expunge from the enrolled bill specified wording that had been added by the erroneous engrossment.²⁰ There was no mention of the erroneous engrossment of amendments 1 through 3, nor of the language that amendment 4 had deleted.

August 11, 1980: By letter, the Secretary of State responded that he agreed as to the spurious character of the wording sought to be expunged, but denied that, as custodian of the laws, he had any authority to comply with the request.

August 12, 1980: The Attorney General of Florida filed a Petition for an Alternative Writ of Mandamus in the Circuit Court for the Second Judicial Circuit to require the Secretary of State to expunge from the enrolled act the wording added by Senate amendment 4 to House amendment 1.²¹ The Attorney General did not request the addition to the enrolled act of the language that was deleted by the erroneous engrossment into

to become the permanent copy of the act. After the enrolled bill has been signed by the governor, it is published in the Laws of Florida. See A. COIGNE, *supra* note 15, ¶ 209; H. WALKER, *supra* note 15, at 368-69.

17. 1980 Fla. Laws ch. 80-257 (codified at FLA. STAT. § 665 (Supp. 1980)).

18. FLA. S. JOUR., 1980 Reg. Sess. at 959.

19. FLA. S. JOUR., 1980 Reg. Sess. at 959; see *infra* notes 188-189.

20. Letter from Philip D. Lewis to George Firestone (Aug. 11, 1980). The enrolled bill for Committee Substitute for Senate bill 348 was in the possession of the Secretary of State pursuant to his constitutional duty to "keep the records of the official acts of the legislative and executive departments." FLA. CONST. art. IV, § 4(b).

21. Petition for an Alternative Writ of Mandamus, *State ex rel. Smith v. Firestone*, No. 80-2354 (2d Cir. Ct. Sept. 5, 1980). The petition did not mention the Senate leadership, for whom the Attorney General was obviously acting.

the bill of Senate amendments 1 through 4.

August 14, 1980: By a Motion to Expedite, the Attorney General informed the circuit court that copy for the 1980 Florida Statutes had to be in the hands of the printer by September 15, 1980, and that "a prompt disposition of this cause will allow submission to the printer of the proper text of Chapter 80-257, Laws of Florida."²²

August 27, 1980: In his Response to the Petition, the Secretary of State stated that he had no independent information concerning Committee Substitute for Senate bill 348 that would justify his complying with the Petition.²³

September 5, 1980: The court issued the Peremptory Writ of Mandamus quoted above. Neither party sought appellate review.

II. MANDAMUS TO EXPUNGE WORDING FROM THE LEGISLATIVE RECORD

The writ of mandamus has been aptly characterized as "a remedy for official inaction."²⁴ Mandamus, which had its origin in the prerogative power of the English sovereign,²⁵

is used to compel a lower court, public officer, public corporation, governmental entity, private corporation or corporate officer to perform a duty involving a ministerial act that the party has a duty to perform. The writ cannot be used where the party has discretion to act, and it cannot be used unless there is no other adequate remedy.²⁶

Under Florida law, the following elements are commonly understood to be the prerequisites for issuance of the writ of mandamus:

1. The law must clearly impose on the respondent an official duty to perform some act.
2. The respondent must have failed or refused to perform that act.
3. The act sought to be compelled by the writ must be ministerial, not requiring the exercise of any discretion.

22. Motion to Expedite at 1, *Firestone*.

23. Response to Petition for an Alternative Writ of Mandamus, *Firestone*.

24. Goodrich & Cone, *Mandamus in Florida*, 4 U. FLA. L. REV. 535 (1951)(citing City of Atlanta v. Wright, 119 Ga. 207, 211, 45 S.E. 994, 995 (1903)).

25. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 620-21 (1838); 52 AM. JUR. 2D *Mandamus* §§ 2, 6 (1970).

26. J. LITTLE, EQUITABLE AND EXTRAORDINARY REMEDIES, THE LAW IN FLORIDA § 4-2 (1980).

4. The party seeking the writ must have a clear legal right to compel performance of the act.

5. The petitioner must have no other adequate or specific remedy.²⁷

In addition, the writ may not be issued when its issuance would be unavailing to the petitioner.²⁸ Issuance of a peremptory writ in the face of the obvious absence of one or more of these prerequisites constitutes an abuse of the writ of mandamus.

The issuance of a writ of mandamus directing the secretary of state to expunge specified wording from the official legislative record in his custody does not meet the traditional prerequisites for the issuance of that writ. Of these prerequisites, the respondent's authority to perform the action sought to be enforced is of special importance. After all, without such authority, the respondent cannot have a duty to the petitioner or anyone else. Without such authority and duty in the respondent, the petitioner has no legal right to such performance. And there can hardly be any such duty or right, or judicial enforcement thereof, unless the action sought to be enforced is essentially nondiscretionary.

A. *Authority of the Secretary of State*

A preexisting authority in the respondent is a critically important and generally acknowledged prerequisite for the issuance of a peremptory writ of mandamus. Thus, the circuit court's order in *Firestone* to the Secretary of State to expunge wording from an enrolled act in his official custody is judicial affirmation that the secretary of state actually possesses such authority.²⁹ Whether the

27. TRIBBLE, *Mandamus*, in *EXTRAORDINARY WRITS IN FLORIDA* § 2.4 (1979) (citations omitted). For examples of element (1), see *State ex rel. Glynn v. McNayr*, 133 So. 2d 312 (Fla. 1961); *State ex rel. Buckwalter v. City of Lakeland*, 112 Fla. 200, 150 So. 508 (Fla. 1933). For an example of element (2), see *County Comm'rs v. State*, 24 Fla. 263, 4 So. 795 (1888). For examples of element (3), see *City of Miami Beach v. Mr. Samuel's, Inc.*, 351 So. 2d 719 (Fla. 1977); *City of Miami Beach v. State ex rel. Epicure, Inc.*, 148 Fla. 255, 4 So. 2d 116 (1941). For an example of element (4), see *State ex rel. Kersey v. Jinkins*, 152 Fla. 113, 10 So. 2d 914 (1942). For examples of element (5), see *Shevin ex rel. State v. Public Serv. Comm'n*, 333 So. 2d 9 (Fla. 1976); *City of Coral Gables v. State ex rel. Worley*, 44 So. 2d 298 (Fla. 1950).

28. See, e.g., *State ex rel. Ostroff v. Pearson*, 61 So. 2d 325 (Fla. 1952); *State ex rel. Bisbee v. Inspectors of Elections*, 17 Fla. 26 (1878).

29. The Supreme Court of Alabama expressly recognized that this very implication would result from its issuance of such a writ in *State ex rel. Brickman v. Wilson*, 123 Ala. 259, 26 So. 482 (1899). At issue was the authority of the Secretary of State of Alabama to expunge matter from the legislative journals, which were in his official custody. The court stated that they could so order the secretary of state only

Florida secretary of state possesses this authority to expunge matter from the legislative record is not a matter that can be pursued on a case-by-case basis. If this authority exists, there must be some source to which it can be attributed.

The Florida Constitution provides only that "[t]he secretary of state shall keep the records of the official acts of the legislative and executive departments."³⁰ Various statutory provisions confirm this role of the secretary³¹ and the Department of State³² as custodians of the official records of the legislative branch of government. None of these constitutional or statutory provisions even hint, however, that the secretary or the Department is in any manner responsible for the content of the official records in their custody. Surely the power to alter cannot be implied from the mere power of custody.³³ It can only be concluded, therefore, that Flor-

after determining that it was the secretary of state's duty, in the absence of all action by any court, to have so determined, [that the legislative journal contained unauthorized material] and thereupon proceeded to erase the alleged foreign matter; and the court cannot so adjudge in this instance without confirming for all time the power and duty of that officer to pass upon what these records contain, and to expunge all that he finds in them which he thinks does not belong there.

Id. at 285-86, 26 So. at 489.

30. FLA. CONST. art. IV, § 4(b); *see also Id.* art. XI, §§ 2(c), 3, 4 (providing for filing with the secretary of state proposals for constitutional amendments, initiative petitions and revision proposals).

31. As head of the Department of State, the secretary of state has authority to "execute the powers, duties, and functions vested in that department." FLA. STAT. § 20.05(1)(a) (1981).

32. "The Department of State shall have the custody of . . . the resolutions of the Legislature . . ." *Id.* § 15.01. "The Department of State shall have custody . . . of the laws of the state and books, papers, journals and documents of the Legislature." *Id.* § 15.02.

All original acts and resolutions passed by the Legislature, and all other original papers acted upon thereby, together with the Journal of the Senate, and the Journal of the House of Representatives, shall, immediately upon the adjournment thereof, be deposited with, and preserved in, the Department of State, by which they shall be properly arranged, classified, and filed . . .

Id. § 15.07.

33. This notion was discussed by the Alabama Supreme Court, which said:

Let the phrase "to keep" be given its broadest meaning . . . yet it falls short of imposing upon the secretary of state the duty, or conferring on him the right, to strike from this record any writing, purporting to be part of it, that may at any time appear upon it . . .

State ex rel. Brickman v. Wilson, 123 Ala. 259, 284, 26 So. 482, 489 (1899).

The Alabama Supreme Court so construed the phrase "to keep" because:

A duty which puts it in the power of a ministerial officer, without adversary proceedings, without notice to anybody, without record of his acts, and without his proceedings being subject to review, to change, amend, and destroy public records of the most vital importance to the state and to its citizens, cannot be implied from the imposition upon him of the duty to safely keep and preserve

ida's secretary of state is without constitutional or statutory authority to expunge wording from an enrolled act that is in his official custody.

B. *The Spurious Legislation Cases*

1. GWYNN V. HARDEE

In *State ex rel. Smith v. Firestone*, the petitioner attorney general cited *Gwynn v. Hardee*³⁴ and *State ex rel. Watson v. Gray*³⁵ as precedents for the court's authority to order expungement of wording from an act of the legislature. Like *Firestone*, *Hardee* involved a statute containing spurious wording. *Hardee*, however, was a proceeding for a temporary injunction, not a writ of mandamus, and therefore was not a valid precedent for the court's action in *Firestone*. Furthermore, the court in *Hardee* did not specifically address the question of physical removal of the spurious wording from the statute. Although the court's opinion in *Hardee* did contain some phrases vaguely suggesting actual expungement of the spurious language,³⁶ there are other phrases which indicated that actual deletion was not intended.³⁷ In any event, the court did not expressly order anyone to expunge wording from the statute.³⁸

2. STATE EX REL. WATSON V. GRAY

State ex rel. Watson v. Gray,³⁹ the second case cited as precedent to the circuit court in *Firestone*, did, however, provide apparent precedent for a court-ordered expunction of statutory wording. *Watson*, like *Firestone*, was an original action in mandamus, brought by the attorney general to require the secretary of state, as custodian of the official records of the legislature, to expunge certain spurious language from an enrolled act that was in his custody.

those records. A power to thus destroy, even with the honest intent to preserve, cannot be implied from a duty to keep, guard, and protect.

Id. at 286, 26 So. at 490.

34. 92 Fla. 543, 110 So. 343 (1926).

35. 153 Fla. 462, 14 So. 2d 721 (1943).

36. The court described the spurious provision as "eliminated and stricken." 92 Fla. at 559, 110 So. at 348.

37. The court referred to the spurious wording as being merely "void and ineffective." *Id.* at 555, 110 So. at 347.

38. For a discussion of the *Gwynn* court's treatment of the statutory infirmity consisting of spurious wording, see *infra* text accompanying notes 167-72.

39. 153 Fla. 462, 14 So. 2d 721 (1943).

During the 1943 legislative session, Senate bill 240, relating to easements on lands subjected to tax sale, passed the Senate and was certified to the House.⁴⁰ The House passed the bill with three amendments.⁴¹ The Senate concurred in House amendments 1 and 2, but requested the House to recede from amendment 3, which would have added a statement of legislative intent to the bill.⁴² The House complied with this request and receded from amendment 3.⁴³ Through a clerical error, however, House amendment 3 to Senate bill 240, which had been rejected by both houses, was nevertheless engrossed into the bill along with amendments 1 and 2, and included in the enrolled bill that was presented for the governor's approval. The governor signed the bill into law.⁴⁴

In the Petition for Mandamus, the Attorney General pointed out that the erroneously engrossed bill was in the custody of the Secretary of State, who would shortly publish the incorrect form of the bill unless commanded by the court to expunge the erroneously included wording. The consequence, he warned, would be "a most confusing situation," not only for the relator, but also for the bench and bar and the general public.⁴⁵ Mandamus, he urged, was the only adequate remedy.⁴⁶

In his Return to the Alternative Writ, the Secretary of State acknowledged the facts presented in the petition. The Secretary explained that he had nevertheless declined to expunge the spurious matter because the bill, which had been filed in his office after its approval by the Governor, imported verity as an official act of the legislature. He stated that "he would not be justified in making any change therein or deleting any language therefrom unless directed to do so by a court of competent jurisdiction."⁴⁷

40. FLA. S. JOUR., 1943 Reg. Sess. at 121.

41. FLA. H.R. JOUR., 1943 Reg. Sess. at 388-89.

42. FLA. S. JOUR., 1943 Reg. Sess. at 319. Amendment 3 would have added the following language: "This act shall apply only if and when the owner or owners of such easement has paid such tax or taxes on such easement, it being the intent of this Act that taxes on such easement be paid only once in each year to each applicable taxing authority." FLA. S.B. 240, 1943 Reg. Sess., amend. No. 3, FLA. H.R. JOUR., 1943 Reg. Sess. at 389.

43. FLA. H.R. JOUR., 1943 Reg. Sess. at 513.

44. 1943 Fla. Laws ch. 21805.

45. Petition for Mandamus at 5-6, *State ex rel. Watson v. Gray*, 153 Fla. 462, 14 So. 2d 721 (1943).

46. Petition for Mandamus at 1, *Watson*. The attorney general did not explain why he had not resorted to the new remedy of declaratory judgment, which had been created by the recent legislative session. 1943 Fla. Laws ch. 21820 (codified as amended at FLA. STAT. §§ 86.011-.111 (1981)). Perhaps he doubted that the necessary expungement of the spurious language could be accomplished by that procedure.

47. Return of Respondent to Alternative Writ of Mandamus at 1, *Watson*.

Justice Terrell, writing for the majority, was rather selective, however, in his response to the Secretary's return, referring only to the statement that the enrolled bill imported verity as an official act of the legislature.⁴⁸ Entirely omitted was any mention of the Secretary's statement that he "would not be justified in making any changes"—in other words, that he lacked authority to do so. The verity issue was easily resolved. Because Florida is a so-called "journal entry" state,⁴⁹ an enrolled bill's presumption of validity is not absolute and can be overcome through resort to the legislative journals.⁵⁰ Having concluded that the legislative journals did indeed show that the enrolled bill contained provisions that had not been approved by both houses of the legislature, the majority held the subject language to be "spurious and illegal" and issued the peremptory writ ordering its expungement from the statute by the Secretary of State.⁵¹ By focusing on a single issue, Justice Terrell was able to avoid even mentioning the question for which he had no answer—whether the secretary of state possessed the preexistent authority that is normally a prerequisite for mandamus.

Absence of any discussion of the secretary's authority is the more notable since the justices obviously discussed the issue in conference. Justice Brown, who was joined in his dissent by Justices Thomas and Sebring, agreed with the majority that House amendment 3 should not have been engrossed into the bill because it had not been enacted by the legislature. He dissented, however, because mandamus lies only to compel the performance of a clear legal duty, and because he knew "of no constitutional or statutory provision giving the Secretary of State the authority to strike from any bill or act of the legislature any part thereof."⁵²

The majority opinion properly cited the earlier cases of *Gwynn v. Hardee*⁵³ and *State ex rel. Cunningham v. Davis*⁵⁴ as precedents for the proposition that an enrolled bill's presumption of authenticity may be overcome through resort to the legislative journals.⁵⁵ Then, however, by a reference citation to "the last cited cases," the majority opinion again cited the same cases as precedent for the court's authority to order expunction of the spurious

48. 153 Fla. at 463-64, 14 So. 2d at 721.

49. See *infra* text accompanying notes 134-36.

50. 153 Fla. at 464, 14 So. 2d at 721.

51. *Id.* at 464, 14 So. 2d at 722.

52. *Id.* at 464, 14 So. 2d at 722 (Brown, J., dissenting).

53. 92 Fla. 543, 110 So. 343 (1926).

54. 123 Fla. 41, 166 So. 289 (1936).

55. 153 Fla. at 464, 14 So. 2d at 721-22.

language by the secretary of state.⁵⁶ Neither case, however, constituted a valid precedent for such authority. It has already been noted that the *Gwynn* court obviously did not have physical expunction of language in mind.⁵⁷ Although the *Cunningham* case was also an original action in mandamus in the supreme court, the petitioner there was attempting to compel the Secretary of the Senate and the Clerk of the House of Representatives to expunge certain allegedly false entries from the journals of their respective houses. Since those legislative officers did have a duty to record a true account of the activities of their respective houses, it is certainly arguable that they had the requisite preexisting authority to perform the act commanded by the writ.⁵⁸ This was certainly no precedent for a court order requiring expungement of statutory wording.⁵⁹

C. *Dickinson v. Stone*

The Florida Supreme Court next ordered the expunction of statutory language in the 1971 case of *Dickinson v. Stone*.⁶⁰ This was also an original action in mandamus, brought by the state Comptroller to require the Secretary of State to expunge certain proviso language from the 1971 General Appropriations Act.⁶¹ As part of a continuing program for the centralization of control over the data processing centers serving the various state agencies,⁶² the legislature directed the transfer of the "complete control and supervision" of, among others, the Carlton Data Center from the office of the Comptroller to the Data Processing Division of the General Services Department.⁶³ The Carlton Data Center served the

56. *Id.* at 464, 14 So. 2d at 722.

57. *See supra* notes 36-37 and accompanying text.

58. *See* *Gray v. Childs*, 115 Fla. 816, 156 So. 274 (1934).

59. Actually, the spurious wording was never physically expunged from the enrolled act. It was, however, omitted from the text of chapter 21805, as published in the 1943 *Laws of Florida*, with a footnote setting out the deleted wording and citing to the opinion of the supreme court. 1943 Fla. Laws ch. 21805.

60. 251 So. 2d 268 (Fla. 1971).

61. 1971 Fla. Laws ch. 71-357, § 2.

62. FLA. STAT. § 23.027(2) (1981).

63. 1971 Fla. Laws ch. 71-357, § 2. That part of the statute to which the comptroller objected read as follows:

It is the intent of the legislature that the electronic data processing division of the department of general services shall assume complete control and supervision of the designated data centers in this section, including accounting, purchasing, personnel and other administrative services for the purpose of providing adequate data processing services to the various users of these centers. Further, the electronic data processing division of the department of general ser-

Comptroller and the Department of Banking and Finance, of which the Comptroller was department head. In his petition for mandamus, the Comptroller argued that the effect of the transfer would be "to transfer to the Department of General Services the supervision and control of the personnel and data processing equipment which are vital and absolutely necessary to the comptroller for the complete exercise of his official constitutional duties of . . . settling and approving accounts against the state"⁶⁴

The Florida Supreme Court stated that although it normally preferred that the constitutionality of a statute be considered first by a trial court, it would nevertheless accept original jurisdiction of the matter on the ground that it involved "a provision of the General Appropriations Act of 1971 so that the functions of government will be adversely affected unless an immediate determination is made by this Court."⁶⁵ Noting simply that a state officer was named as respondent and that the Comptroller was entitled to question the validity of this portion of the statute, the court denied the motion to quash.⁶⁶ There was no citation of precedent in support of the court's jurisdiction.

Having accepted jurisdiction based on the Comptroller's allegation that the proviso would prevent him from fulfilling his "official constitutional duties," the court then abandoned that rationale as justification for holding the statute invalid and issuing the peremptory writ. Instead, the court relied on an entirely different ground, one that the Comptroller had not even mentioned. In an opinion by Justice Adkins, the court held that enactment of the transfer of the data center as part of the General Appropriations Act offended article III, section 12 of the Florida Constitution, which provides: "Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject."⁶⁷ The court reasoned that the transfer

vices is directed to provide programming and coordination, to the end that all centers function efficiently and economically and render all possible service to the state departments and agencies serviced.

Id. Carlton Data Center was one of the designated data centers.

64. 251 So.2d at 271. The comptroller's duties are stated in article IV, section 4(d) of the Florida Constitution.

65. 251 So. 2d at 271.

66. *Id.* (citing FLA. CONST. art. V, § 4(2); FLA. R. APP. P. 4.5(b); 21 FLA. JUR. *Mandamus* § 51 (1958)).

67. FLA. CONST. art. III, § 12. In his Reply Brief, petitioner noted that the question of conflict with article III, section 12 had been "thoroughly discussed and argued at the oral argument by both the Petitioners and Respondents." Reply Brief at 5, *Dickinson*, 251 So. 2d at 268. The fact that argument occurred despite total absence of any mention of this

of the data center from one department of state government to another "was not so relevant to, interwoven with, and interdependent upon the appropriation of funds for the operation of the Carlton Data Center so [sic] as to justify under the constitutional provision its inclusion within the General Appropriations Act."⁶⁸ It thereupon directed issuance of a Peremptory Writ of Mandamus, ordering the Secretary of State to expunge the offending paragraph from the act,⁶⁹ and directed that the appropriation for the Carlton Data Center be considered part of the budget of the Comptroller instead of the Department of General Services.⁷⁰ The court cited no precedent for the action taken.⁷¹

question in the petition for mandamus or the supporting brief certainly suggests that this was basically a very friendly action. See *Petition for Mandamus, Dickinson*, 251 So. 2d at 268; Reply Brief, *Dickinson*, 251 So. 2d at 268.

68. 251 So. 2d at 274 (citation omitted). The court also held that, in failing to mention the attempted transfer, the title of the act was defective under article III, section 6 of the Florida Constitution, which reads: "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."

69. 251 So. 2d at 274. The lack of seriousness with which the court issued the peremptory writ is revealed by the way it is addressed. The order to expunge wording from an act of the legislature is addressed not only to the Secretary of State—the only official capable of performance—but also to Chester Blakemore, as executive director of the Department of General Services, and to the Department of General Services, consisting of the governor and cabinet, with all of the members listed. Peremptory Writ at 1, *Dickinson*, 251 So. 2d at 268.

70. 251 So. 2d at 274.

71. Although the *Dickinson* majority offered no precedents in support of the action that it took, there were cases that could have been cited which arguably support both the court's resort to mandamus in order to make an immediate determination of an important public question, and the court's order requiring expungement of wording from a statute. It is possible, however, that these precedents were left unmentioned precisely because they would have emphasized the incongruity of the court's action in the context of this case. For example, in both *State ex rel. Ayres v. Gray*, 69 So. 2d 187 (Fla. 1953) and *State ex rel. West v. Gray*, 70 So. 2d 471 (Fla. 1954), the court responded to petitions in mandamus to require the Secretary of State to expunge certain matters from the election records. The expungement would have been ordered from records that the Secretary of State was responsible for compiling. Although whether or not this duty was ministerial is questionable, it was at least arguable that the Secretary had authority to perform the act which may have been ordered. In *Dickinson*, however, the Secretary had no such authority.

The *Dickinson* majority could also have cited *State ex rel. Watson v. Gray* as precedent, albeit a weak one, for its order requiring the Secretary to expunge wording from an act of the legislature. Citing to *Watson*, however, would also have emphasized the incongruity of the instant holding. In *Watson*, the wording ordered expunged was demonstrably spurious, never having become law because never approved by the legislature. See *supra* text accompanying note 44. The wording ordered expunged in *Dickinson*, however, was not only law, but also accurately expressed the intent of the legislature. It had simply been held unconstitutional and therefore unenforceable. There was certainly no precedent for expunging wording simply because it was unconstitutional. Indeed, statutory provisions that have been held unconstitutional may later be held to be constitutional. See, e.g., *School Bd. of Broward County v. Price*, 362 So. 2d 1337 (Fla. 1978).

In drawing the foregoing distinction between expunction of spurious wording and ex-

Justice Ervin, dissenting, questioned whether the "mechanical or ministerial work of electronic data processing for the state and all its agencies" improperly and unduly impinged upon the constitutional duties of the comptroller and whether the quoted paragraph was really so substantive as to be out of place in the General Appropriations Act.⁷² More important for the present discussion, however, he questioned the appropriateness of the court's order to expunge matter from the statute, saying:

Lastly, I am particularly dismayed by the Court arrogating to itself a prime function of the Legislature by ordering the Secretary of State to expunge the language under attack followed by the Court transferring part of an appropriation of state funds from one state department to another. Even the Governor has to veto an appropriation item as a whole including the language accompanying it.

Here we do not content ourselves with holding the language under attack unconstitutional and either invalidating the language itself or the item as well, but we take over the legislative function to complete what in our wisdom we think ought to have been done by rewriting the item as a whole by expungement and by transferring the lump sum appropriation made to one department to another.⁷³

The majority did not respond to Justice Ervin's challenge to the court's authority to order expungement of wording from the statute.

In *Dickinson*, the Florida Supreme Court violated virtually every requirement for issuance of the writ of mandamus.⁷⁴ It or-

punction of unconstitutional wording, the writer does not wish to be understood as condoning either. The requisite preexisting authority in the secretary of state is equally lacking in both situations.

72. 251 So. 2d at 276 (Ervin, J., dissenting).

73. *Id.* at 279-80. Justice Ervin's objection to the expungement order was weakened considerably by his combining it with his protest concerning the transfer of the appropriated funds to the comptroller. Assuming the correctness of the court's holding that the attempted transfer was invalid as a part of the General Appropriations Act, one can hardly question the court's authority to redirect the appropriation to the agency that was to administer the activity being funded.

74. The court's holding also violated one of its own appellate rules. The Florida Appellate Rules in effect at the time of the court's opinion in *Dickinson* provided that an application for any of the extraordinary writs "will not be entertained by the Court" when it "raises questions of fact that will require the taking of testimony." FLA. R. APP. P. 45a(2). The Comptroller's assertion that the offending proviso transferred supervision and control of the data center that was "vital and absolutely necessary to the Comptroller in the exercise of his constitutional duties," 251 So. 2d at 271, was sufficiently complex and doubtful that the petition should have been denied under the rule. In his dissent, Justice Ervin char-

dered performance of an action that was clearly outside the authority of the respondent Secretary of State, and to which, consequently, the petitioner Comptroller could not have had the necessary preexisting "clear legal right."⁷⁵ Additionally, the court accepted jurisdiction to determine the constitutionality of the statute on the basis urged by the petitioner, but then switched to an entirely different ground, one not mentioned by the petition for mandamus, as the basis for issuing the peremptory writ.⁷⁶ Actually, the statute did not qualify upon either of these grounds for such a challenge by mandamus. Normally, challenges to the constitutionality of statutes arise in mandamus proceedings in one of two ways:

(1) [b]y the claim of the relator that a statute which, if valid, would excuse the respondent from performing the act or duty sought to be enforced is unconstitutional;

(2) by the claim of the respondent that the statute relied on by the relator as imposing on him the duty sought to be enforced is invalid and that therefore he is under no obligation to perform the same.⁷⁷

The statute involved in *Dickinson* neither imposed nor excused the performance of the duty sought to be enforced.

acterized this as a "bureaucratic dispute," stating: "It is not for us to postulate such impingement from mere pleading allegations here submitted without convincing proof." 251 So. 2d at 276. The doubtful validity of the Comptroller's assertion was revealed by the fact that on June 3, 1974, less than three years after the *Dickinson* decision, Comptroller Dickinson was the prime mover of a resolution of the Florida Cabinet which transferred supervision and control of the Carlton Data Center to the Department of General Services. Transcript of Cabinet Meeting at 19-21 (Sept. 3, 1974).

75. See *supra* text accompanying note 27. In the Petition for Mandamus the Comptroller inserted this rather transparent bid for legitimacy:

5. The Secretary of State, Honorable Richard B. Stone, is charged with the duty and responsibility of keeping the records of the official acts of the legislative and executive departments (Article IV, Section 4(b), Florida Constitution, 1968). . . .

This duty is ministerial in nature and requires no exercise of discretion.

Petition for Mandamus at 5, *Dickinson*, 251 So. 2d at 268. The quoted passage is less than forthright as it suggests that the Secretary's duty consists of more than mere custody. Also, it implies that it is the described constitutional function that will be the subject of the court's order in mandamus. The court's willingness to acquiesce in this very dubious claim for relief by mandamus strongly suggests that, for reasons of its own, the court was quite determined to assume jurisdiction.

76. See *supra* text accompanying note 67.

77. 52 AM. JUR. 2D *Mandamus* § 94 (1970) (footnotes omitted). "[T]he constitutionality of a statute may be raised in a mandamus proceeding, where the right to the issuance of the writ is dependent on a determination of this question, and the statute affirmatively imposes or excuses the performance of some duty." 16 C.J.S. *Constitutional Law* § 95 (1956) (footnotes omitted).

Finally, the court ordered performance of an act by the respondent that was of no apparent benefit to the petitioner. The statutory proviso in question became void and inoperable with the court's holding that it was constitutionally invalid.⁷⁸ The further requirement that it be expunged from the statute added nothing. The real purpose of the proceeding was to determine the constitutional validity of the statutory proviso that was so offensive to the comptroller. The proceeding in mandamus was a mere pretext for invoking the original jurisdiction of the supreme court.

D. *Division of Bond Finance v. Smathers*

Division of Bond Finance v. Smathers,⁷⁹ decided in 1976, also involved a situation purporting to require the immediate attention of the state's highest court. The 1976 legislature had appended the following proviso to the annual appropriation for the Division of Recreation and Parks of the Department of Natural Resources: "Provided that any future sales of general obligation bonds for environmentally endangered lands shall have as the first priority the repayment of monies expended for debt service from the Land Acquisition Trust Fund."⁸⁰ The governor vetoed the proviso, in part because he doubted its constitutional validity under article VII, section 11 of the state constitution,⁸¹ and in part because he had been informed by the legislative leadership that the proviso had been accidentally included in the appropriations bill by drafting error.⁸² Fearing that the Endangered Lands Bond Program⁸³ would be jeopardized as a result of widespread doubts concerning the validity of the proviso and the validity of the governor's attempted veto,⁸⁴ the governor and cabinet authorized the Department of

78. See *State ex rel. Nuveen v. Greer*, 102 So. 739 (Fla. 1924).

79. 337 So. 2d 805 (Fla. 1976).

80. 1976 Fla. Laws ch. 76-285, § 1 item 853.

81. FLA. CONST. art. VII, § 11(a) provides: "State bonds pledging the full faith and credit of the state may be issued only to finance or refinance the cost of state capital projects" The proviso in question required the expenditure of the proceeds of general obligation bonds for purposes other than the financing or refinancing of the cost of state capital projects.

82. 337 So. 2d at 806.

83. FLA. STAT. § 259 (1975).

84. FLA. CONST. art. III, § 8(a) provides: "The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates." The governor did not wish to veto the appropriation for the Division of Recreation and Parks, and was afraid that his veto of the proviso might be considered an unconstitutional veto of a "qualification or restriction." 337 So. 2d at 806.

General Services' Division of Bond Finance to initiate proceedings to challenge the constitutional validity of the proviso or to have the governor's veto declared valid.⁸⁵ Expressing fear that a harmful delay might result from a proceeding in the circuit court,⁸⁶ the division brought an original action for mandamus in the supreme court to have the proviso declared invalid and ordered expunged from the statute or, alternatively, to have the governor's veto declared valid.⁸⁷

Justice Boyd, writing for a unanimous court, dutifully expressed the court's reluctance to consider the issue of statutory invalidity prior to its consideration by a trial court. However, he continued, "[T]he remedy of mandamus has been awarded by this Court in original actions before in order to expunge unconstitutional language from a General Appropriations Act."⁸⁸ Justice Boyd cited *Dickinson* as authority for the proposition that the standard for the court's issuance of such an order to expunge language from a statute is whether "the functions of government will be adversely affected without an immediate determination."⁸⁹ He continued, "On its face the assertion by the Governor and the Division that the State Bond Program and Environmentally Endangered Lands Bond Program are jeopardized by the questionable constitutionality of the proviso and the doubt over the effectiveness of the Governor's veto meets the *Dickinson* standard."⁹⁰

85. 337 So. 2d at 806-07.

86. "Petitioners have no other available remedy sufficiently speedy to prevent material injury to the State. Proceedings in the Circuit Court, subject to appeal, could not be completed in sufficient time to avoid such injury by breach of contract, with the resultant damage to the State's credit reputation." Petition for Writ of Mandamus at 6, Division of Bond Finance v. Smathers, 337 So. 2d 805 (Fla. 1976). The governor and cabinet headed both departments involved in the action.

87. 337 So. 2d at 807. It is noted incidentally that the mandamus facade, consisting of the request that the Secretary of State be ordered to expunge the invalid proviso from the statute, covered only one of the alternative remedies, as described by both the petition and the court's opinion. Perhaps it was intended that the proviso be expunged if held invalid or if vetoed, and there was simply a failure to state the conclusion accurately. Perhaps, on the other hand, such carelessness of expression was actually a symptom of the legitimizing role of the writ of mandamus in this particular case.

88. *Id.* (citing *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971)). Justice Boyd's language suggests that this is one of the court's regular procedures and that it applies uniquely to appropriations acts. *Dickinson*, however, was the only precedent available to him. Moreover, the involvement of an appropriations act in the present case, at least, was fortuitous. See *infra* note 110.

89. 337 So. 2d at 807. Justice Boyd defined "standard" in terms of the expungement of the provision from the statute instead of the real issue: the need for an expedited proceeding before the supreme court.

90. *Id.*

Justice Boyd found it unnecessary even to consider the validity of the governor's attempted veto, since the proviso was held to be, on its face, violative of article VII, section 11(a) of the Florida Constitution.⁹¹ He thereupon ordered issuance of the peremptory writ commanding the Secretary of State to expunge the proviso from the act.⁹² There were no dissents.

The spurious nature of the court's use of mandamus in this and similar cases is revealed by the following postscript to the court's opinion. The invalid proviso was never, in fact, expunged from, or marked in any way on, the enrolled act that is on file in the Department of State. The peremptory writ of mandamus "was inadvertently never issued by the court."⁹³ Such inadvertence would be quite impossible, of course, if this had been a bona fide proceeding in mandamus of sufficient importance to require the immediate attention of the state's highest court. Such an oversight could only occur in a proceeding in which mandamus was a mere pretext for the accomplishment of an unrelated purpose. In this case, that purpose was to bring an adjudication of statutory validity within the original jurisdiction of the supreme court.

The Florida Supreme Court's holding in *Division of Bond Finance* was no less abusive of the traditional elements of mandamus than was its holding in *Dickinson*. True, the court could now cite *Dickinson* as precedent for its action, and because a state bond program was involved, it may have been easier to believe that an expedited decision by the state's highest court was necessary.⁹⁴ Nevertheless, as in *Dickinson*, there was no suggestion that there was a preexisting authority in the secretary of state to perform the act commanded by the peremptory writ. As before, the court ordered an action by mandamus that was of no discernible benefit to

91. 337 So. 2d at 807. For the text of article VII, section 11(a), see *supra* note 81.

92. 337 So. 2d at 807.

93. Letter from Sid White, Clerk of the Supreme Court, to Jack Shreve, Public Counsel (Oct. 17, 1979). Mr. Shreve was General Counsel for the Department of State at the time *Division of Bond Finance* was decided.

94. A recent law review article written by two research aides to members of the Florida Supreme Court characterized the court's action as follows:

The court has on occasion stretched its mandamus powers to the limit in emergency situations. In *Division of Bond Finance v. Smathers*, the court expunged unconstitutional language from a general appropriations act which threatened the state with an economic calamity even though a challenge to the validity of the act in circuit court would have achieved the same result.

Borgognoni & Keane, *Practice Before the Supreme Court of Florida: A Practical Analysis*, 8 STETSON L. REV. 318, 353 (1979) (footnotes omitted). If regular procedures in circuit court would have achieved the same result, wherein lay the emergency?

the petitioner. As before, the court created the right that it then issued the writ to enforce.

E. *Brown v. Firestone*

*Brown v. Firestone*⁹⁵ is the most recent of the line of cases under discussion. In *Brown*, certain House leaders, including the speaker, as citizens and taxpayers, challenged the validity of several gubernatorial vetoes of provisions of the General Appropriations Act of 1979.⁹⁶ The challenge was by petition to the original jurisdiction of the supreme court for mandamus to require the Secretary of State to expunge the invalid vetoes from the official records that were in his custody, and to prevent the Comptroller from disbursing state funds based on the invalid vetoes.⁹⁷ The Governor in effect counterclaimed, arguing that certain of the challenged vetoes were valid because they pertained to "specific appropriations" and that the remainder of the vetoes were valid because they were directed to provisions that were themselves constitutionally invalid.⁹⁸

The court, speaking through Justice Sundberg, justified its acceptance of jurisdiction by citing to *Dickinson v. Stone* and *Division of Bond Finance v. Smathers*. The court stated:

In both cases we held mandamus to be the appropriate remedy because the functions of government would have been adversely affected without an immediate determination. In view of these recent authorities we are obliged to conclude that the case before us also requires an immediate determination. The challenged vetoes have cast doubt upon the expenditure of substantial amounts of public funds. Because this lingering uncertainty hampers the state's ability to finance ongoing state projects, the Court will exercise its discretion to consider this case.⁹⁹

Petitioners' standing to maintain this action in mandamus was assessed by standards appropriate to any legal challenge to the validity of a statute, rather than by standards appropriate to actions in mandamus. Having previously held that a citizen and taxpayer

95. 382 So. 2d 654 (Fla. 1980).

96. 1979 Fla. Laws ch. 79-212.

97. 382 So. 2d at 657.

98. *Id.* at 662. The Governor contended that the provisos violated article III, section 12 of the Florida Constitution, which states that: "Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject."

99. *Id.*

could mount a constitutional attack upon the legislature's taxing and spending power without having to demonstrate a special injury,¹⁰⁰ the court now found that these petitioners had standing to petition for mandamus, although, as citizens and taxpayers, "[t]hey claim no special or extraordinary injury."¹⁰¹ There was no discussion of the usual critical questions in mandamus proceedings: whether the respondent had clear and preexisting authority to perform the act sought to be enforced; whether the petitioner had a clear legal right to the performance of that act; and whether there was an adequate alternative remedy.¹⁰²

On the merits, the court found four of the six challenged vetoes valid. As to the two invalid vetoes, the court found that the vetoed provisions were themselves unconstitutional.¹⁰³ Consequently, although the court had accepted jurisdiction on the basis of a petition requesting an order commanding expungement of the invalid vetoes from the official records of the legislature, it actually found it unnecessary to order such expungement.

The court concluded its opinion with an admonition that its acceptance of jurisdiction in the instant case should not be construed as a general willingness to become involved in the biennial power struggle between the legislative and executive branches of government over appropriations acts. The court concluded that "[m]andamus is an extremely limited basis for jurisdiction which traditionally has been, and will continue to be, employed sparingly. Hence, future attempts to invoke this Court's jurisdiction on similar grounds will be viewed with great circumspection."¹⁰⁴ The court continued:

To that end we outline the proper shape which similar litigation should assume in the future. Any person, as citizen and taxpayer, may bring suit and have stricken a gubernatorial veto of a qualification or restriction in a general appropriations bill, *even if the qualification or restriction is clearly unconstitutional*, unless the governor can successfully demonstrate that the qualification or restriction itself constitutes a specific appro-

100. *Department of Admin. v. Horne*, 269 So. 2d 659 (Fla. 1972).

101. 382 So. 2d at 662.

102. See *Heath v. Beckett*, 327 So. 2d 3 (Fla. 4th DCA 1976); see also *supra* notes 27-28. Further evidence of the casualness with which the court was using mandamus proceedings consisted of its reference to the Secretary of State as a "nominal respondent," 382 So. 2d at 657, an unlikely designation in a mandamus proceeding where the Secretary is the person to whom the court's order will be directed.

103. 382 So. 2d at 669-72.

104. *Id.* at 671.

priation within the intendment of article III, section 8(a). In such a proceeding no issue may be raised as to the constitutionality of the qualification or restriction. That is, the governor cannot counterclaim that his action was prompted by an unconstitutional legislative act. In this context a mandamus action should be limited to narrow issues of law which do not require extensive fact-finding.¹⁰⁵

As to challenges to the constitutionality of the provisions of a general appropriations act, the court stated that a person as taxpayer and citizen could bring a declaratory judgment action in the circuit court, in which a full record can be developed.¹⁰⁶

The Florida Supreme Court's opinion in *Brown v. Firestone* is notable for its lack of forthrightness. First, without expressly overruling *Dickinson* and *Division of Bond Finance*, the court effectively repudiated its holdings in those cases that mandamus is a proper means of challenging the constitutionality of provisions of a general appropriations act. Actually, the *Brown* court had relied on those two cases in coming to the conclusion that it was "obliged" to give the instant case its immediate attention.¹⁰⁷ It is now obvious, however, that both *Dickinson* and *Division of Bond Finance* would have been relegated to declaratory judgment proceedings in the circuit court according to the *Brown* court's outline of the "proper shape which similar litigation should assume in the future."¹⁰⁸

Second, the *Brown* court's interpretation of *Dickinson* and *Division of Bond Finance* as applying only to general appropriations acts, and the consequent limitation of its outline for future litigation to situations involving such acts, is confusing. In both cases the court accepted jurisdiction "because the functions of government would have been adversely affected without an immediate determination" by the court,¹⁰⁹ and not because general appropriations acts were involved.¹¹⁰ The fact that the cases involved appro-

105. *Id.* (emphasis in original).

106. *Id.*

107. *Id.* at 662.

108. *Id.* at 671.

109. *Id.*

110. In *Dickinson* the ground for the final decision, conflict with article III, section 12 of the Florida Constitution, was peculiar to appropriations acts. The ground upon which the petitioner originally brought the case before the supreme court—that the statute would transfer supervision and control of personnel and facilities that were essential to the Comptroller in the performance of his constitutional duties—was not so peculiar. 251 So. 2d at 273-74. In *Division of Bond Finance*, the ground for the decision, violation of article VII, section 11(a) of the Florida Constitution, had no necessary relevance for appropriations acts

priations acts was largely, if not entirely, fortuitous.

Another problem with the decision in *Brown* is the distinction drawn by the court between future challenges to qualifications or restrictions in appropriations acts and to attempted vetoes thereof. Surely, unconstitutional vetoes of such qualifications or restrictions are no more likely to endanger important functions of government than is the enactment of such qualifications or restrictions in the first place. If, as the court stated, its primary concern is to protect important governmental functions from being endangered,¹¹¹ it is unclear why challenges to substantive provisions should be relegated to declaratory judgment proceedings in the circuit court, while challenges to attempted vetoes of substantive provisions continue to be permitted by mandamus in the supreme court.

The court's stated basis for this distinction is that a factual record is necessary in determining the constitutionality of a statutory provision.¹¹² This rationale, however, must be viewed with skepticism. The possibility always exists that a factual record might be needed in a given case. The argument with which the Comptroller originally petitioned the court in *Dickinson* fairly bristled with the kind of uncertainty that demands a factual record.¹¹³ If the need for an instant determination by the state's highest court is as compelling as was indicated in *Dickinson*, *Division of Bond Finance* and *Brown*, was it not also sufficiently compelling to override the procedural problem of creating a factual record? In the very few cases before the supreme court that would reach that level of urgency, the court could appoint a commissioner to take testimony and prepare the required record.¹¹⁴ Actually, the court simply wished to withdraw from an untenable procedure into which it had slipped in those earlier cases. It should have said so.

Finally, the *Brown* court failed even to mention what was undoubtedly a contributing reason for the timing of its withdrawal from the *Dickinson* and *Division of Bond Finance* precedents. On March 11, 1980, just two days before the court issued its opinion in the *Brown* case, the people of Florida approved a constitutional amendment that largely eliminated the problem that gave rise to

per se. 337 So. 2d at 807.

111. 382 So. 2d at 662; see *supra* text accompanying note 104.

112. 382 So. 2d at 671.

113. See *supra* note 74.

114. See, e.g., *McCarty v. Booth*, 69 So. 2d 655, 657 (Fla. 1954) ("In extremely rare instances this court has found it necessary to have testimony taken and has appointed a circuit judge as commissioner for that purpose."); *State ex rel. Landis v. S.H. Kress Co.*, 117 Fla. 791, 158 So. 456 (1935).

the aberrational procedures of those cases in the first place.¹¹⁵ The 1980 amendment created section 3(b)(5) of article V, which states that the supreme court:

[m]ay review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.¹¹⁶

This means that upon certification by a district court of appeal,¹¹⁷ the Florida Supreme Court can immediately and authoritatively review a matter that is properly initiated at the trial court level without having to contrive to hear it under its original jurisdiction. The extraordinary procedures of the *Dickinson* and *Division of Bond Finance* cases are no longer necessary. The court should have said so.

F. Conclusion

A search for possible precedents for the peremptory order of the Circuit Court for Leon County in *State ex rel. Smith v. Firestone*,¹¹⁸ ordering the Secretary of State to expunge specified wording from an act of the legislature, uncovered only four arguably applicable Florida Supreme Court decisions.¹¹⁹ Each was initiated by a petition for a writ of mandamus to require the secretary of state to expunge material from the legislative records in his official custody.¹²⁰ Only in *State ex rel. Watson v. Gray*, however, was ex-

115. See 1980 Fla. Laws S.J.R. No. 20-C.

116. FLA. CONST. art. V, § 3(b)(5).

117. The original version of this provision, as recommended by the Florida Supreme Court in 1979, would have placed complete control of the ability to hear cases in the supreme court. That version read: "[The supreme court] [m]ay, on its own initiative only, review any order, judgment or decision of any court of this state which substantially affects the general public interest or the proper administration of justice throughout the state." See England, Jr., 1979 *Report on the Florida Judiciary*, 53 FLA. B.J. 296, 304 app. C § 3(b)(7) (1979).

118. No. 80-2354 (2d Cir. Ct. Sept. 5, 1980).

119. *Brown v. Firestone*, 382 So. 2d 654 (Fla. 1980); *Division of Bond Finance v. Smathers*, 337 So. 2d 805 (Fla. 1976); *Dickinson v. Stone*, 251 So. 2d 268 (Fla. 1971); *State ex rel. Watson v. Gray*, 153 Fla. 462, 14 So. 2d 721 (1943).

120. In *Watson* the Secretary of State was directed to expunge from a statute material that was "spurious" and not part of the law because never approved by the legislature. In *Dickinson* and *Division of Bond Finance*, the Secretary was directed to expunge from statutes wording that had been held unconstitutional in those cases. In *Brown* the court accepted jurisdiction in order to require the Secretary to expunge all references to allegedly invalid vetoes from the legislative records in his custody; on the merits, however, the court found it unnecessary to order such expungement.

pungement per se the actual objective of the proceeding. There, the Attorney General sought to have the spurious material removed from the legislative act in order to avoid having it appear in the 1943 Laws of Florida that were shortly to be published by the Secretary of State.¹²¹ In the other three cases, mandamus was merely employed as an expedient means of enabling petitioners to bring a challenge to the validity of a statute within the original jurisdiction of the supreme court.¹²² In none of those cases could expungement per se have contributed in any way to the legitimate interests of the petitioner. Moreover, in none of the four opinions was there any acknowledgment of the absence from those cases of the usual prerequisites for the mandamus remedy: a clear authority and duty in the respondent to perform the act sought to be enforced and a clear legal right to that performance in the petitioner.

On the merits, it would be difficult to find fault with the Florida Supreme Court's handling of the four cases under discussion. The wording challenged in *Watson* was clearly spurious and not part of the law; the provisions challenged in *Dickinson* and *Division of Bond Finance* were clearly unconstitutional; and, in *Brown*, the court established clear and authoritative boundaries to both the legislature's power to attach qualifications and restrictions to appropriations and to the governor's power to veto items of appropriations acts. What is disturbing about these cases, however, is that they imply that the secretary of state actually has the authority to alter the official legislative records in appropriate circumstances, and that the extraordinary writ of mandamus can be thus subverted by the Florida Supreme Court for the sole purpose of bringing a matter before the court that it could not otherwise hear. The *Brown* court apparently had misgivings concerning one or more of the implications of the earlier cases, for it seized upon the opportunity to withdraw from dangerous territory. Yet, the court in *Brown* left open the question of the appropriateness of a judicial order to the secretary of state requiring him to expunge matter from an act of the legislature.

This question was answered in the recent case of *Department of Education v. Lewis*.¹²³ *Lewis* was a proceeding for a declaratory judgment to test the validity of a certain proviso in the 1981 Gen-

121. See *supra* text accompanying note 45.

122. See *supra* note 120.

123. 416 So. 2d 455 (Fla. 1982).

eral Appropriations Act.¹²⁴ Pursuant to the procedure established by the 1980 constitutional amendment discussed above,¹²⁵ the District Court of Appeal for the First District certified to the Florida Supreme Court the trial court's decision upholding the validity of the proviso.¹²⁶

On the merits, the supreme court reversed, holding the challenged proviso to be unconstitutional.¹²⁷ The opinion, written by Justice Boyd, closed as follows: "The proviso quoted at the beginning of this opinion is unconstitutional and void. The Comptroller is directed to disregard it. The Secretary of State is directed to strike it from chapter 81-206."¹²⁸ The first of the quoted sentences merely summarizes the holding. The second is redundant, though harmless; it merely states the natural consequence of a holding of statutory invalidity. The third sentence makes no sense at all. True, the enrolled act is in the custody of the Department of State, of which the secretary is department head, and it is obviously susceptible to physical alteration. But to what end? The pamphlet law and session law versions of chapter 81-206 had long since been published and distributed. Moreover, appropriations acts, not being of a "general and permanent nature," are not even codified in the Florida Statutes.¹²⁹ It is likely, therefore, that no one would ever have looked at that document were it not for the court's order to expunge wording from it; and it is equally likely that no one will ever examine it again. Of what possible significance, then, was the supreme court's directive to the Secretary of State to strike from chapter 81-206 the invalid proviso? Apparently, there is none.

The Florida Supreme Court's demonstrated obsession with the notion that it is appropriate for the judiciary to order alteration of the official legislative record is both ironic and disturbing. It is ironic in that what originated as a pretext for asserting original jurisdiction has acquired a life and momentum of its own. It is disturbing that such a notion, having implanted itself in the minds of the justices of the state's highest court, could well become part of the general jurisprudence of the state. It is difficult to imagine a more blatant violation of the separation of powers principle. The executive and judicial branches of Florida government should not

124. 1981 Fla. Laws ch. 81-206, § 1.

125. FLA. CONST. art. V, § 3(b)(5); *see supra* text accompanying notes 116-17.

126. 416 So. 2d at 457.

127. *Id.* at 463.

128. *Id.*

129. *See* FLA. STAT. § 11.242(5)(c) (1981).

assume an authority to alter the official records of the legislative branch.

Also disturbing is the prospect that the distortions of mandamus that were introduced by the *Dickinson* and *Division of Bond Finance* cases may also have become part of the state's jurisprudence. Although those cases were effectively repudiated by *Brown* insofar as the future jurisdiction of the supreme court is concerned, they were not repudiated in terms that vindicate the writ of mandamus. Mandamus should not be used when the prerequisites for its issuance are absent.¹³⁰ It is hoped that the order issued by the Circuit Court for Leon County in *Firestone* will prove to be only an aberration, and that the disturbing prospect will not come to pass. At its first opportunity, the Florida Supreme Court should confirm that the historic writ of mandamus is what it has always been—nothing more, nothing less.

III. VARIATIONS IN STATUTORY TEXT

Spurious legislation consists of wording in the enrolled bill approved by the governor that was not present in the bill as enacted by the legislature. It must be recognized, however, that human error is equally disposed toward other forms of variations in wording. Thus, a variation may also consist of wording that has been erroneously omitted from the enrolled bill and wording that has been both added and omitted—i.e., simply changed. The following sections propose an appropriate framework for determining the consequence of such material variations of wording.

A. *Journal Entry Rule Versus Enrolled Bill Rule*

The question under discussion—i.e., What is the consequence of a variation in wording between an enrolled bill that has been approved by the governor and the same bill as enacted by the legislature? (hereafter, simply "variation")—could never legally arise in half of American jurisdictions, including the federal courts.¹³¹ Following the so-called "enrolled bill" rule,¹³² the courts of those jurisdictions consider the enrolled bill that has become law the best evidence of the content of the statute and of the fact that it

130. For the prerequisites for issuance of the writ of mandamus, see *supra* text accompanying notes 27-28.

131. *Field v. Clark*, 143 U.S. 649 (1892).

132. 1 C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 15.03 (4th ed. 1972); 73 AM. JUR. 2D *Statutes* §§ 88, 90 (1974); 82 C.J.S. *Statutes* § 83 (1953).

was enacted in full accordance with constitutional procedural requirements. In other words, the courts cannot resort to any other evidence, whether documentary or testimonial, for the purpose of impugning the enrolled act.¹³³

In the remaining jurisdictions, including Florida,¹³⁴ which follow the so-called "journal entry" or "affirmative contradiction" rule,¹³⁵ the question of the effect of such a variation can legally arise. In those jurisdictions, the enrolled bill constitutes only *prima facie* evidence of the statute's content and of the validity of the procedures by which it was enacted. Positive evidence from the legislative journals can be used to impugn the enrolled bill.¹³⁶

B. Materiality

It is unlikely that the law of any jurisdiction requires absolute identity between the bill enacted by the legislature and the enrolled bill presented to the governor for his approval. Of necessity, there must be some leeway by which minor typographical or clerical errors can be corrected.¹³⁷ Certainly, this is true in Florida.¹³⁸

133. See authorities cited *supra* note 132.

134. See, e.g., *State ex rel. Watson v. Gray*, 153 Fla. 462, 14 So. 2d 721 (1943); *State ex rel. Markens v. Brown*, 20 Fla. 407 (1884).

135. 1 C. SANDS, *supra* note 132, § 15.04; 73 AM. JUR. 2d *Statutes* § 88 (1974); 82 C.J.S. *Statutes* § 83 (1953).

136. See authorities cited *supra* note 135.

137. 1 C. SANDS, *supra* note 132, § 15.17 (Absolute correspondence is not required. Minor discrepancies and clerical errors which do not change the substance and legal effect of the statute will be disregarded.).

138. In *Haworth v. Chapman*, 113 Fla. 591, 152 So. 663 (1933), for example, the defendant in a criminal action argued that a statutory provision reading "Any person or persons guilty of violating the provisions of Section 1 of this Act shall be deemed guilty of a felony and, upon conviction thereof, shall be fined not more than Ten Thousand (\$10,000.00) Dollars and ten years in the State penitentiary" was unconstitutionally vague because it failed to specify that imprisonment was authorized. 1921 Fla. Laws ch. 8466, § 2. The Florida Supreme Court supplied the words "imprisonment for" before the words "ten years in the State penitentiary," saying that this was "merely to supply words obviously intended to be used but inadvertently or accidentally omitted in transcribing the bill in the Legislature, and for this there is ample precedent." 113 Fla. at 597, 152 So. at 665.

In *Sebesta v. Miklas*, 272 So. 2d 141 (Fla. 1972), the court had before it a statute providing for a single unified government for Hillsborough County. Davis Islands, constituting Precinct 3, had been clerically omitted from the description of District No. 2. It was evident, however, from several sources, including maps, summaries of legislation, population figures, and the like, that its inclusion in District No. 2 was intended throughout and that the omission was purely inadvertent. *Id.* at 144-45. The Florida Supreme Court construed the statute as including the missing reference, saying that "it would seem that if the legislative intent with regard to a word or phrase omitted from a statute is readily ascertainable, whether or not such intent appears from the content of the statute itself, then this Court may supply such omitted word or phrase." *Id.* at 145; see also *Armstrong v. City of Edgewater*, 157 So.

It is material variations that are of concern, in that they exceed what the courts of the given jurisdiction are willing to correct in the course of construing a statute. Presumably, variations resulting from erroneously engrossing or failing to engross amendments are material since they were the specific object of legislative attention.¹³⁹

C. *Total Versus Partial Invalidity*

The requirement of article III, section 8(a) of the Florida Constitution that "[e]very bill passed by the legislature shall be presented to the governor for his approval"¹⁴⁰ clearly implies that the document that is presented to the governor must be essentially the same as the one passed by the legislature. To the extent, therefore, that a material variation between the two versions of a bill exists, there is some degree of constitutional invalidity.

The question necessarily arises, however, whether such invalidity is to be viewed as infecting the entire bill or only the portion represented by the variance. Logic points as clearly in the one direction as in the other. When there is a material variation between the two versions of a bill, it can reasonably be said that the bill presented to the governor is not the same bill that was passed by the legislature. On the other hand, it can just as reasonably be said that, except for the variance, it is the same bill.

The weight of authority favors the proposition that "[i]f there is a material variance between the bill passed and the bill presented to the chief executive, the latter cannot properly be said to be the same bill which was passed by the legislature, and the entire enactment is invalidated."¹⁴¹ As we shall see, however, the Florida courts have taken the position that the holding of invalidity in such circumstances initially applies only to that portion of the bill that is represented by the variation.¹⁴²

2d 422 (Fla. 1963); *In re Estate of Sherman*, 146 Fla. 643, 1 So. 2d 727 (1941).

139. Certainly the variations which occurred in *State ex rel. Smith v. Firestone* as a result of the erroneous engrossment of four amendments would be considered material. The presence of the amendments caused the House to refuse to pass the bill. See *supra* text accompanying notes 13-16.

140. FLA. CONST. art. III, § 8(a).

141. 73 AM. JUR. 2D *Statutes* § 70 (1974); see also *State ex rel. Foster v. Naftalin*, 246 Minn. 181, 74 N.W. 2d 249 (1956); 82 C.J.S. *Statutes* § 60(b) (1953).

142. See *State ex rel. Watson v. Gray*, 153 Fla. 462, 14 So. 2d 721 (1943); *Gwynn v. Hardee*, 92 Fla. 543, 110 So. 343 (1926); *State ex rel. Boyd v. Deal*, 24 Fla. 293, 4 So. 899 (1888).

D. Severability

If a statute is held to be partially invalid, the court must then decide whether the valid and invalid portions are severable from each other.¹⁴³ If severable, the obligation of the court is to give effect to the remaining valid portion. Severability is a question of legislative intent.¹⁴⁴ A statute will be considered severable if it is determined that the legislature would have enacted the valid portion even if the invalid portion had not been presented to it.¹⁴⁵ Normally, this inquiry as to legislative intent would require a substantive analysis of both portions of the statute, their relationship to each other, and their relationship to the legislature's purpose in the enactment of the legislation.

Statutes that are partially invalid because of variations are not immune from the need for severability analysis. There is an added factor, however, when such variations result from the engrossment of amendments that failed of enactment or when there is a failure to engross amendments that were enacted. The added factor is that the legislature, in the course of acting on the amendments, has actually expressed its intent, either affirmatively or negatively, as to the valid portion of the statute. The importance of such expressions of legislative intent will vary from being relatively slight to being decisive, depending on the circumstances in which the variation occurred.

Consider, for example, a variation consisting of spurious language.¹⁴⁶ Regardless of the source of the spurious wording, it may be conclusively presumed that the legislature would have enacted the valid portion of the bill without the spurious invalid portion, since it actually did so. Thus, there is very little that the usual severability analysis can add to that showing of legislative intent.

Consider, next, a variation resulting from the erroneous en-

143. "In judicial usage the terms 'separable,' 'severable,' and 'divisible' are synonymous." 2 C. SANDS, *supra* note 132, § 44.01.

144. This inquiry is in response to the well-established principle that a court is obligated to give the fullest possible effect to the apparent intent of the legislature.

145. See, e.g., *Barndollar v. Sunset Realty Corp.*, 379 So. 2d 1278 (Fla. 1979); *State v. Lee*, 356 So. 2d 276 (Fla. 1978); *High Ridge Management Corp. v. State*, 354 So. 2d 377 (Fla. 1978); *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974); *Louis K. Liggett Co. v. Lee*, 109 Fla. 477, 149 So. 8 (1933); 73 AM. JUR. 2D *Statutes* § 383 (1974); 82 C.J.S. *Statutes* § 93 (1942); 1 T. COOLEY, COOLEY'S CONSTITUTIONAL LIMITATIONS 359-68 (8th ed. 1927).

146. Spurious wording can result either from the omission at engrossment of an amendment enacted by the legislature, which would have deleted wording from the bill, or from the engrossment of an amendment rejected by the legislature, which would have added wording to the bill.

grossment of an amendment, rejected by the legislature, which would have deleted wording from the bill.¹⁴⁷ By rejecting the amendment, the legislature in effect rejected the text that would have resulted from the proposed deletion of wording—i.e., the text of the enrolled bill approved by the executive. Although this scenario gives rise to a fairly strong inference of negative legislative intent, it could be overcome by contrary conclusions drawn as the result of the normal severability analysis previously described.¹⁴⁸

Finally, consider the situation in which an amendment that would have added wording to the bill was enacted by both houses of the legislature, but was then erroneously omitted from the enrolled bill. Because the legislature actually altered the text of the bill, one could infer a negative legislative intent. Again, however, it would be a relatively weak inference of legislative intent that could be overcome by contrary conclusions from the usual severability analysis.

E. *The Spurious Legislation Cases*

1. STATE EX REL. BOYD V. DEAL

The earliest Florida decision involving the problem of spurious legislation was *State ex rel. Boyd v. Deal*,¹⁴⁹ decided in 1888. *Deal* involved a bill consisting of thirty-one sections that was passed by the Florida Senate.¹⁵⁰ The House amended the bill by striking everything after the enacting clause and substituting eight new sections.¹⁵¹ The Senate concurred in this House amendment.¹⁵² The enrolling clerk, however, treated the House amendment as if it merely substituted the eight new sections for the first eight sections of the original thirty-one-section bill. Thus, the enrolled bill that was presented to the governor for his approval consisted of the eight sections inserted by the House amendment as well as sections 9 through 31 of the original Senate bill.¹⁵³ The governor approved the bill and it apparently became law.¹⁵⁴

147. This, indeed, was the posture of amendments 1, 2, and 3 to Committee Substitute for Senate Bill 348, which was before the court in *State ex rel. Smith v. Firestone*. See *infra* note 189.

148. See *supra* text accompanying note 145.

149. 24 Fla. 293, 4 So. 899 (1888).

150. FLA. S.B. 74, 1887 Reg. Sess.; FLA. S. JOUR., 1887 Reg. Sess. at 336.

151. FLA. H.R. JOUR., 1887 Reg. Sess. at 690.

152. FLA. S. JOUR., 1887 Reg. Sess. at 741.

153. 24 Fla. at 294, 4 So. at 900.

154. 1887 Fla. Laws ch. 3780.

The relators in this original action in mandamus, who were members of the city council of Palatka, sought to compel the respondent city assessor to assess property located within the city under section 7 of the act.¹⁵⁵ The respondent assessor argued that the assessments should be made pursuant to general law rather than under the act, since section 30 of the act provided that it was not to go into effect until the mayor and councilmen had been elected and qualified under it. The relators then argued that section 30 was not part of the act, since only sections 1 through 8 had been properly enacted by both houses of the legislature.¹⁵⁶

The majority justices concluded, virtually without discussion, that sections 9 through 31 were indeed invalid because they had never been enacted by the two houses of the legislature.¹⁵⁷ The remainder of the opinion was then directed to the question whether the first eight sections of the act were nevertheless valid and enforceable.

Sections 1 through 8 of the act were obviously severable from the remaining sections, in that they could stand alone and certainly in that the legislature had actually intended that they be enacted in the place of the original thirty-one sections.¹⁵⁸ The majority justices discerned an added consideration, however, when there were obvious inconsistencies between the valid and invalid portions, as here.¹⁵⁹ They were concerned that in exercising his veto power, the governor might have been influenced to approve the bill by the portion that had not received legislative sanc-

155. 24 Fla. at 311, 4 So. at 907-08 (Maxwell, C.J., dissenting). It is interesting to note that the spurious portion of the statute in question was attacked by the party urging enforcement of the non-spurious portion, rather than by the party seeking to avoid its effect.

156. *Id.* at 311, 4 So. at 908 (Maxwell, C.J., dissenting).

157. *Id.* at 298, 4 So. at 902.

158. See *supra* text accompanying note 151. The court recognized that "[i]t is a rule that if, when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained" 24 Fla. at 303, 4 So. at 904 (citing 1 T. COOLEY, *supra* note 145, at 362).

159. In short, the majority rejected the usual statement of the severability rule that required only that the valid portion of the statute be able to stand alone and that it adequately express the intent of the legislature. Instead, they took the view that the valid portion should be upheld as enforceable only

when there is in the invalid portion nothing which shows a different legislative intent, as to the subject matter of the genuine parts, than is shown by the latter, and the latter parts are sufficient to secure or authorize an enforcement of this extent . . . without the aid of whatever there may be in the invalid parts

24 Fla. at 304, 4 So. at 904. The statute under review failed to meet this test.

tion—i.e., the spurious part.¹⁶⁰ Observing that the Florida governor is an integral part of the lawmaking process, the court concluded that he could not properly perform his legislative role when there was such diversity and inconsistency between the spurious portion and the valid portion, as in the instant case.¹⁶¹ The court thus concluded that the valid and invalid portions of the act were not severable and that the act was therefore void in its entirety.¹⁶²

Chief Justice Maxwell dissented.¹⁶³ He viewed the governor's role in approving or disapproving legislation as essentially negative in nature, rather than legislative, because the governor is authorized only to negate legislation, not to participate in its enactment.¹⁶⁴ Therefore, he could see no reason for applying a different rule of severability to statutes containing spurious material, as here, than would be applied to statutes held partially invalid on other grounds. According to Chief Justice Maxwell, if the remaining valid portion accurately expressed the legislative intent, that portion should have been enforced.¹⁶⁵ The dissent concluded that the first eight sections were obviously severable in this sense and therefore should have been valid and enforceable.¹⁶⁶

160. *Id.* at 306, 4 So. at 905-06.

161. *Id.* at 306-10, 4 So. at 905-07.

Whenever an ostensibly perfect bill is submitted to the governor for his action as a part of the lawmaking power, and he considers and approves its several parts collectively and with the idea that they are all valid, and it subsequently appears that some of them are spurious, a court should hesitate before pronouncing any of its parts to have the force of law; and should not give them such effect unless it is entirely clear that the spurious parts are such as could not have influenced him to approve the other parts, or, in other words, unless the latter are entirely severable, or distinct and independent, from the former.

Id. at 310, 4 So. at 907.

162. *Id.* at 310, 4 So. at 907.

163. *Id.* at 311, 4 So. at 907 (Maxwell, C.J., dissenting).

164. *Id.* at 315-18, 4 So. at 910-11 (Maxwell, C.J., dissenting).

When an act is passed and presented to the Governor for his approval, it is not because that approval is necessary to make it a law; for it becomes a law irrespective of his approval, if he does not challenge it by a veto; and, even if he vetoes it, it may become a law independent of him by a two-thirds vote of the two houses of the Legislature. It is clear, therefore, that the Governor's agency in the passage of laws is not affirmative, but only a sign to indicate that he has no veto to interpose.

Id. at 317, 4 So. at 910.

165. *Id.* at 315, 4 So. at 909.

166. *Id.* at 319-20, 4 So. at 911.

2. GWYNN V. HARDEE

In *Gwynn v. Hardee*,¹⁶⁷ the Florida Supreme Court adopted the position enunciated by Chief Justice Maxwell in his *Deal* dissent: that the principle of severability should apply in the same form to statutes that are partially invalid because they contain spurious language and to statutes that are partially invalid on other grounds. The issue in *Hardee* was whether the state school-book commission could be enjoined from proceeding under a contract for the purchase of school books because, pursuant to the terms of the contract, a certain statutory provision¹⁶⁸ would not be applied.¹⁶⁹ The Supreme Court of Florida held that the commission could not be enjoined because the statutory provision involved "was not passed by the Legislature, but was inadvertently and by mistake of the committee clerks written into the engrossed and enrolled copies of the bill after its passage,"¹⁷⁰ and was thus "void and ineffective" and not binding upon the commission.¹⁷¹

In an opinion written by Circuit Judge Campbell, the court then turned to the question of whether the existence of such spurious language vitiated the entire act. The court expressly rejected any notion that there was an added factor of possible influence on the governor's exercise of his veto power resulting from the admittedly spurious language. Indeed, the *Hardee* court concluded to the contrary, that the logic favoring a finding of severability was even stronger in such cases as this. The court explained:

There are more compelling reasons for excluding a spurious portion of the law because never enacted and permitting the other portions validly enacted to remain than for permitting to remain as enforceable valid portions of an act, parts of which have been held void because unconstitutional. In the former situation, unless the spurious matter is taken out and the law permitted to stand as it passed, the entire legislative intent would be thwarted because of the matters interpolated into the bill by mistake or otherwise which were never intended by the legislative bodies.¹⁷²

167. 92 Fla. 543, 110 So. 343 (1926).

168. 1921 Fla. Laws ch. 8500, § 12.

169. 92 Fla. at 551-52, 110 So. at 344-46.

170. *Id.* at 552, 110 So. at 346.

171. *Id.* at 555-58, 110 So. at 347-48.

172. *Id.* at 557, 110 So. at 348.

3. STATE EX REL. WATSON V. GRAY

In *State ex rel. Watson v. Gray*,¹⁷³ the court again faced the problem of spurious language in a legislative act.¹⁷⁴ An amendment that would have added wording to a bill was rejected by both houses of the legislature, but was then erroneously engrossed into the bill for presentation to the governor, who later approved it.¹⁷⁵ The court, on the basis of the legislative journals, concluded that the portion erroneously included in the bill "was spurious and illegal and should be stricken,"¹⁷⁶ while it left the remaining portion of the act valid and enforceable.

Despite this clear finding of partial invalidity, the court never even mentioned the issue of severability, probably because the conclusion was thought to be too obvious. Since the amendment in question had been expressly rejected by both houses, there was no doubt that it met the usual test of severability, i.e., that the legislature would have enacted the valid portion alone. Unfortunately, the majority justices missed an opportunity to clarify the question raised in *Deal* and *Hardee*: whether the doctrine of severability should be applied differently to statutes containing spurious language than to statutes that are partially invalid on other constitutional grounds.

F. Variations in Statute Titles

A brief digression is required with respect to variations that occur in the titles of legislative acts instead of in the text. Since the title does not become a part of the law, but is intended only to provide notice of the content of a bill throughout the legislative process,¹⁷⁷ it would seem that the principle of severability, per se, would not apply to those variations. Instead, the determination of whether a legislative act will survive a material variation in its title should turn on the question of whether the title as enacted by both houses of the legislature was adequate to provide the notice re-

173. 153 Fla. 462, 14 So. 2d 721 (1943).

174. *Watson* was discussed earlier in terms of the precedent it provided for a court to order the Secretary of State to expunge spurious wording from an enrolled act that is in his custody. See *supra* text accompanying notes 39-59.

175. 153 Fla. at 462, 14 So. 2d at 721. For a more detailed discussion of the facts in *Watson* see *supra* text accompanying notes 40-44.

176. 153 Fla. at 464, 14 So. 2d at 722.

177. *Finn v. Finn*, 312 So. 2d 26 (Fla. 1975); *Hillsborough County v. Price*, 149 So. 2d 912 (Fla. 1963).

quired by the constitution.¹⁷⁸ After all, by the time the enrolled version of the bill is presented to the governor for his approval, the title of the bill has substantially served its purpose. The governor's decision to approve or disapprove the act should surely be based on more than a mere reading of the title.¹⁷⁹

Although the Florida courts have scarcely discussed the notice requirement in any of the Florida cases involving material variations in the titles of legislative acts, their outcomes are generally consistent with the suggested analysis.¹⁸⁰ In *State ex rel. Attorney General v. Green*,¹⁸¹ for example, although the court's opinion contains a substantial discussion of the issue of severability,¹⁸² the court nevertheless upheld the validity of the statute on the ground that the title, even without its spurious language, gave adequate notice of the content of the bill.¹⁸³

G. Conclusion: The Validity of Chapter 80-257

The highly unusual order of the circuit court in *State ex rel. Smith v. Firestone*¹⁸⁴ directing the Secretary of State to expunge certain wording from an enrolled act that was in the Secretary's official custody triggered the present inquiry. It is therefore appropriate that this paper conclude with an assessment of that order's efficacy in light of the precedents and principles that have been discussed and with an inquiry into the current constitutional status of chapter 80-257.

If the petition for mandamus that resulted in the order to expunge was indeed intended to assure that the "proper text" of chapter 80-257, Laws of Florida,¹⁸⁵ would be available for inclusion

178. FLA. CONST. art. III, § 6.

179. This consideration probably accounts for the remark by the Florida Supreme Court in *State ex rel. Attorney General v. Green*, 36 Fla. 154, 175, 18 So. 334, 337 (1895):

It may be that the necessity and reasons for the requirement that the subject of an act shall be restricted to the subject expressed in the title as it passed the legislative bodies do not exist with the same urgency as applied to the approval of the law by the governor

180. See, e.g., *State ex rel. Landis v. City of Sanford*, 113 Fla. 750, 152 So. 193 (1934); *Freeman v. Simmons*, 107 Fla. 438, 145 So. 187 (1932); *Wade v. Atlantic Lumber Co.*, 51 Fla. 628, 41 So. 72 (1906).

181. 36 Fla. 154, 18 So. 334 (1895).

182. *Id.* at 174-80, 18 So. at 331-38.

183. *Id.* at 178-79, 18 So. at 337-38.

184. No. 80-2354 (2d Cir. Ct. Sept. 5, 1980). For a discussion of the facts in *Firestone*, see *supra* text accompanying notes 1-23.

185. 1980 Fla. Laws ch. 80-257.

in the then-forthcoming edition of the Florida Statutes,¹⁸⁶ it certainly failed in that endeavor. Not only was the wording that was ordered to be expunged inaccurately identified,¹⁸⁷ but providing the "proper text" of the act would also have required the insertion of wording that had been deleted as a result of the erroneous engrossment of the same amendment,¹⁸⁸ as well as the three other

186. See Motion to Expedite at 1, *State ex rel. Smith v. Firestone*, No. 80-2354 (2d Cir. Ct. Sept. 5, 1980); *supra* text accompanying note 22.

187. The following quotation of the language ordered to be expunged was the text of the erroneously engrossed Senate amendment 4 to House amendment 1. See FLA. C.S./S.B. 348, 1980 Reg. Sess., amend. 4 to House amend. 1, FLA. S. JOUR., 1980 Reg. Sess. at 959. The underlined portion, however, was also a part of the text of House amendment 1 and therefore was in no sense spurious:

Each application for approval of the establishment and maintenance of a branch office shall state the proposed location thereof, the need therefore, the functions to be performed therein, the estimated volume of business thereof, the estimated annual expense thereof, and the mode of payment therefor. Each such application shall be accompanied by a budget of the association for the current earnings period and for the next succeeding semi-annual period, which reflects the estimated additional expense of the maintenance of such a branch office.

State ex rel. Smith v. Firestone, No. 80-2354, slip op. at 1. See FLA. C.S./S.B. 348, 1980 Reg. Sess., § 665.030(1)(c), FLA. H.R. JOUR., 1980 Reg. Sess. at 720.

188. The wording which Senate amendment 4 to House amendment 1 would have deleted, and which therefore should have been left in the bill when Senate amendment 4 was withdrawn, can be found in proposed section 665.030(1)(c) and (d). FLA. C.S./S.B. 348, 1980 Reg. Sess., § 665.030(1)(c), (d), FLA. H.R. JOUR., 1980 Reg. Sess. at 720.

(c) . . . Each application for approval of the establishment and maintenance of a branch office shall be in such form as the department may prescribe and shall state:

1. The proposed location thereof;
2. The functions to be performed therein;
3. The estimated volume of business thereof;
4. The estimated annual expense thereof;
5. The mode of payment therefor; and
6. Such other information as the department may require.

(d) Upon receipt by the department of such an application, it shall consider the following:

1. The sufficiency of capital accounts to support the association's deposit base and the additional fixed assets proposed for the branch and its operations, without undue exposure to its depositors, members or stockholders.
2. The sufficiency of earnings and earnings prospects to support the anticipated expenses of the branch, without jeopardizing the financial position of the association.
3. The sufficiency and quality of management available to operate the branch.
4. The name of the proposed branch reasonably identifies the branch and is not likely to unduly confuse the public.
5. The association's substantial compliance with all state and federal law affecting its operations.

erroneously engrossed amendments.¹⁸⁹

The more important question, of course, is whether the resulting invalidity of chapter 80-257 was total or only partial. An adjudication of this question could go either way. On the one hand, since the discrepancies in the text of the enrolled bill resulted from the erroneous engrossment of formal amendments offered to the bill, there is no doubt as to their materiality.¹⁹⁰ Also, since the amendments had actually passed the Senate and were then with-

189. The wording which was deleted as the result of the erroneous engrossment into the bill of Senate amendment 1 to House amendment 1 can be found in proposed section 665.020(5)(a). FLA. C.S./S.B. 348, 1980 Reg. Sess., § 665.020(5)(a), FLA. H.R. Jour., 1980 Reg. Sess. at 715.

(a) . . . In determining whether an applicant meets the requirements of this paragraph the department shall consider all materially relevant factors including:

1. The location and services offered by existing associations in the general service area as indicative of the competitive climate of the market.

2. The area's general economic and demographic characteristics.

The wording which was deleted as the result of the erroneous engrossment into the bill of Senate amendment 2 to House amendment 1 can be found in proposed section 665.020(5)(b). FLA. C.S./S.B. 348, 1980 Reg. Sess., § 665.020(5)(b), FLA. H.R. Jour., 1980 Reg. Sess. at 715.

(b) . . . In determining whether an applicant meets the requirements of this paragraph the department shall consider all materially relevant factors including:

1. Current economic conditions and the growth potential of the community in which the proposed association intends to locate.

2. The growth rate, size, financial strength, and operating characteristics of associations in the general service area of the proposed association.

The wording which was deleted as the result of the erroneous engrossment into the bill of Senate amendment 3 to House amendment 1 can be found in proposed section 665.020(5)(d). FLA. C.S./S.B. 348, 1980 Reg. Sess., § 665.020(5)(d), FLA. H.R. Jour., 1980 Reg. Sess. at 715.

(d) . . . In determining whether an applicant meets the requirements of this paragraph the following minimum capitalization requirements must be met:

1. \$2,000,000 in savings account capital for a mutual association or \$1,500,000 in voting common capital stock for a capital stock association if the population of the community in which the association is to have its home office does not exceed 100,000.

2. \$2,500,000 in savings account capital for a mutual association or \$2,000,000 in voting common capital stock for a capital stock association if the population of the community in which the association is to have its home office exceeds 100,000.

3. Every capital stock association hereafter organized shall establish, in addition to the capital required by this section, a paid-in surplus equal in amount to not less than 20 percent of its paid-in capital.

The department may, however, in its discretion, require a larger amount by rule. Nothing in this paragraph shall be construed to require any existing association to increase its capital structure over that existing on the effective date of this act.

190. See *supra* text accompanying note 138.

drawn at the insistence of the House¹⁹¹—the obvious alternative being the death of the bill or its reference to a conference committee—the negative inference as to legislative intent is somewhat stronger than would otherwise be the case.¹⁹²

On the other hand, it is not unreasonable to anticipate that a severability analysis would support a finding of partial, rather than total, invalidity. It simply does not seem that the segments of the statute affected—whether taken individually or in combination—were sufficiently important to require an inference that the legislature would not have enacted this long and complex regulatory measure without them. Actually, the text remaining after the deletions resulting from the erroneous engrossment of Senate amendments 1 and 2, respectively, was substantially the same as in the preexisting law.¹⁹³ Moreover, there is little reason to believe that the text added by House amendment 1 and then deleted by the erroneous engrossment of those two amendments was really that important.¹⁹⁴

Although the textual discrepancy resulting from the erroneous engrossment of Senate amendment 4 was more complex, since it consisted of both the deletion and addition of wording, the statutory segment involved only the kind of information the Department of Banking and Finance was to consider in approving the establishment of branch offices.¹⁹⁵ Surely this segment was not of great consequence and could have been omitted from the regulatory scheme.¹⁹⁶

In view of this uncertainty as to whether chapter 80-257 was susceptible to being held totally or only partially invalid, what corrective measures should the legislature have taken? The best possible procedure in these circumstances would have been the immedi-

191. See *supra* text accompanying note 13.

192. See *supra* text accompanying notes 145-48.

193. See FLA. STAT. § 665.031(4)(a), (b) (1979).

194. In each instance, the wording that was erroneously deleted merely specified the various factors that were to be taken into account by the department in making the substantive determination that the remaining, relatively unchanged wording required. See *supra* note 189.

195. FLA. STAT. § 665.028(1)(c) (Supp. 1980).

196. It is true that the wording remaining after the deletions resulting from the erroneous engrossment of Senate amendment 3 to House amendment 1 required that the proposed capital structure be "adequate," FLA. STAT. § 665.0201(5)(d)(1981), whereas House amendment 1 had established specific "minimum capitalization requirements." FLA. C.S./S.B. 348, 1980 Reg. Sess., § 665.020(5)(d), FLA. H.R. JOUR., 1980 Reg. Sess. at 715. Although the change introduced by the House amendment and erroneously deleted was to that extent substantive, it was hardly momentous.

ate reenactment of the equivalent of Committee Substitute for Senate bill 348, properly engrossed. From the time of such reenactment, that procedure would have been completely efficacious regardless of which view concerning the degree of statutory invalidity finally prevailed. For reasons of its own, however, the legislature did not avail itself of an early opportunity to perform this necessary remedial procedure during a one-day special session that occurred on November 18, 1980.¹⁹⁷

Whatever the nature and degree of the constitutional infirmity that resulted from the erroneous engrossments to Committee Substitute for Senate bill 348, it infected only the resulting legislative act—chapter 80-257. Nevertheless, when the legislature finally acted to correct the resulting errors, it did not address chapter 80-257, but its codified version in chapter 665 of the Florida Statutes. With the enactment of chapter 81-117, the 1981 legislature simply amended the various sections of chapter 665 to correct the errors that had resulted from the erroneous engrossment into Committee Substitute for Senate bill 348 of Senate amendments 1 through 4 to House amendment 1.¹⁹⁸ Chapter 80-257 therefore remained as susceptible to constitutional attack as before.

Whether this procedure was adequate to assure a viable statutory program for the regulation of savings associations in Florida depends in part upon the view that one takes concerning the extent of the constitutional invalidity that infects chapter 80-257 as a result of these erroneous engrossments. Under the view that only partial invalidity resulted, and that the remaining portion of the act is valid and enforceable law, the regulatory scheme is apparently now immune from constitutional attack on that ground. By the enactment of chapter 81-117, the 1981 legislature inserted in chapter 665 the exact wording that had been erroneously omitted and deleted the exact wording that had been erroneously included, thereby perfectly assuring the completeness of the regulatory scheme.

Under the view that chapter 80-257 was rendered totally invalid by the erroneous engrossments of the 1980 session, however, the

197. The session met from 2:30 p.m. until 7:30 p.m. on November 18, 1980, for the sole purpose of enacting legislation granting the Florida Supreme Court authority to expand the jurisdiction of the statewide grand jury upon petition by the Governor. *See* FLA. H.R. JOUR., Sp. Sess. of Nov. 18, 1980; FLA. S. JOUR., Sp. Sess. of Nov. 18, 1980.

198. 1981 Fla. Laws 224, ch. 81-117 (codified at FLA. STAT. §§ 665.0201(5)(a), (b), (d), .028(1)(c), (d) (1981)) (amending FLA. STAT. §§ 665.021(5)(a), (b), (d), .028(1)(c) (Supp. 1980)).

picture is rather more complicated, in that the conclusions to be drawn must depend partly upon certain obscure and as yet unadjudicated ramifications of Florida's continuous statutory revision program.¹⁹⁹ An important feature of the program is the biennial adoption of the portions of the Florida Statutes that are being carried forward from the preceding regular edition of the Florida Statutes as "the official statute law of the state."²⁰⁰ By way of illustration, this means that the version of chapter 80-257 that was originally codified in the 1980 Supplement to the Florida Statutes as chapter 665 was only *prima facie* evidence of the law,²⁰¹ and retained that status until it was carried forward into the 1983 edition, when it was adopted as positive law by the 1983 legislature.²⁰²

During the period when chapter 665 was thus only *prima facie* evidence of the law, chapter 80-257 constituted the best evidence of the law. If, therefore, during that period, chapter 80-257 had been adjudicated totally invalid, chapter 665 of the Florida Statutes would necessarily have fallen with it, and there would have been no statutory basis for the regulation of savings associations in Florida. Actually, there was no judicial challenge to the constitutional validity of chapter 80-257 during that period, and chapter 665 was, in fact, enacted into positive law by the 1983 legislature.²⁰³

Since it would be quite inconsistent with this new status as "the official statute law of the state" for chapter 665 to continue in such a state of jeopardy, subject to a potential attack on the constitutional validity of the underlying legislative act, the author is of the firm opinion that chapter 665 is now immune from such attack. Unfortunately, however, there is no precise judicial precedent that directly supports this opinion, and there is, moreover, reason to doubt that the Florida Supreme Court would agree with it.

The Florida Supreme Court has been quite erratic in its prior adjudications concerning the proposition that adoption of a codification as positive law immunizes it against subsequent indirect constitutional attack through the underlying statute by which the specific provision was originally enacted. The court has repeatedly held that such adoption cures title defects under article III, section

199. FLA. STAT. §§ 11.2421-11.2425 (1981).

200. *Id.* § 11.2421 (1981).

201. *Id.* § 11.242(5)(c) (1981).

202. 1983 Fla. Laws ch. 83-61, § 1 (to be codified at FLA. STAT. § 11.2421 (1983)).

203. *Id.*

6 of the Florida Constitution,²⁰⁴ thereby immunizing the codified version of the law from attack on this ground.²⁰⁵ A very recent opinion extended this curative effect to a defect consisting of a violation of the single subject requirement of article III, section 6.²⁰⁶ Indeed, there are very early cases actually holding that the adoption of the Revised Statutes of 1892 into positive law had the effect of validating substantive changes in the law that had been initiated by the commissioners who had compiled the code.²⁰⁷

On the other hand, the court, in a poorly reasoned opinion, once held that such curative effect did not extend to a defect consisting of the failure to republish an amended law, as required by article III, section 6, of the Florida Constitution.²⁰⁸ Similarly, in another recent case, the court rejected, without discussion, the notion that adoption of the Florida Statutes as positive law could have the effect of reviving provisions of the Florida Statutes that had previously been repealed by implication.²⁰⁹

In view of this past record, it is difficult to anticipate how the Florida Supreme Court would rule on the proposition that adoption of the Florida Statutes as positive law would cure²¹⁰ a defect consisting of a material variation in wording between an enrolled act and the bill as passed by the two houses of the legislature.²¹¹

204. FLA. CONST. art. III, § 6: "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."

205. *Belcher Oil Co. v. Dade County*, 271 So. 2d 118 (Fla. 1972); *McConville v. Ft. Pierce Bank & Trust Co.*, 101 Fla. 727, 135 So. 392 (1931); *Christopher v. Mungen*, 61 Fla. 513, 55 So. 273 (1911); *Richey v. Town of Indian River Shores*, 337 So. 2d 410 (Fla. 4th DCA 1976), *aff'd*, 348 So. 2d 1 (Fla. 1977).

206. *State v. Combs*, 388 So. 2d 1029 (Fla. 1980). For the text of article III, section 6, see *supra* note 204.

207. *Inman v. Davis*, 125 Fla. 298, 169 So. 741 (1936); *Mathis v. State*, 31 Fla. 291, 12 So. 681 (1893).

208. *Massachusetts Bonding and Ins. Co. v. Bryant*, 189 So. 2d 614 (Fla. 1966). For a critical analysis of this holding, see Means, *Repeals by Implication in Florida: A Case Study*, 7 FLA. ST. U.L. REV. 423, 458-59 (1979). FLA. CONST. art. III, § 6 provides: "No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection."

209. *North Am. Mortgage Investors v. Cape San Blas Joint Venture*, 378 So. 2d 287 (Fla. 1979).

210. The consequence under discussion has been referred to herein as constituting a "cure" of a procedural defect in the prior legislative act only because that is the way courts commonly refer to it. It would be more accurate to say that the constitutional defect in the original act of the legislature simply becomes irrelevant when the act is superseded by its codified version at the time the latter is adopted as positive law. Upon such adoption, the codified version becomes the best evidence of the law. As such, its legitimacy cannot be made to depend upon the legitimacy of some prior legislative act.

211. The highest court of at least one state has so held. *Keaton v. State*, 212 Tenn. 690, 372 S.W. 2d 163 (1963).

This means, then, that the current status of the law by which Florida savings associations are regulated is infected by a double layer of confusion. There is confusion resulting from uncertainty as to the extent of the invalidity that resulted from the erroneous engrossments of amendments during the 1980 session. This confusion is then further compounded by the uncertainty concerning the duration of the period during which the regulatory program will remain susceptible to constitutional attack because of the variations in wording.

Although the likelihood of such an attack now seems remote, this is confusion that need not be tolerated, for it can be easily dissipated. All that is required is for the legislature to reenact chapter 665 of the Florida Statutes as it presently exists. This simple procedure would terminate for all time the uncertainties resulting from the 1980 experience.